EFFECT OF RECEIVERSHIP OF CORPORATION ON ITS EXECUTORY CONTRACTS. — The law of the liability on executory contracts of a corporation in the hands of a receiver is in a most unsatisfactory condition. Courts are not even agreed as to the issues involved. Some judges confine their arguments to the question whether or not the insolvent corporation has an excuse of impossibility of performance, while others deal solely with the question of the provability of the claim.[1] As to the first question it seems clear that the receivership proceedings do not necessarily make performance by the corporation impossible, since the receiver often has power to carry on the contract.[2] Even where the impossibility does exist, it should not be held to terminate existing contracts. The corporation has acted in such a way that it cannot perform its agreement with the plaintiff without imperiling the rights of its other creditors. The refusal of the state to permit performance under such circumstances is merely the legal consequence of the corporation's own acts, and should not excuse the latter from liability.[3] There is, however, considerable authority for the contrary view.[4]

The further question whether this liability, when established, is a basis for a provable claim presents more serious difficulties. In the first place, opinions differ as to whether or not the status of claims should be determined as of the date of the beginning of the receivership proceedings.[5] Since, however, it will generally be impracticable to hold open the settlement of the estate until the date for the performance of all contracts has arrived, the same problem remains whatever date of provability be decided upon. One argument against allowing the claim in question to be proved at all is that, if the contract is still executory on both sides, the liability of the corporation is contingent on per-

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[1] There is a like difference of opinion as to the liability of a bankrupt under similar circumstances. One view is that the adjudication in bankruptcy annuls all contracts. *In re* Jefferson, 93 Fed. 948; *In re* Inman & Co., 171 Fed. 185. By the weight of authority, however, liability of some sort remains. *In re* Neff, 157 Fed. 57. See Watson *v.* Merrill, 136 Fed. 359, 363; *In re* Roth, 181 Fed. 667, 670.

[2] Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250.

[3] Rosenbaum *v.* United States Credit System Co., 61 N. J. L. 543, 40 Atl. 591; Peck *v.* Southwestern Lumber and Exporting Co., 59 So. 113 (131 La.). Even the dissolution of a corporation should not terminate its contracts any more than death does those of an individual. Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281.

[4] People *v.* Globe Mutual Life Ins. Co., 91 N. Y. 174. This case is regarded as the leading one denying liability, and yet much of the reasoning in the opinion applies only to contracts for personal service. On any other interpretation it is in conflict with later New York decisions. *Cf.* People *v.* St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129; People *v.* Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412. In the following cases, however, liability on ordinary mercantile contracts was denied: Malcomson *v.* Wappoo Mills, 88 Fed. 680; Griffith *v.* Blackwater Boom and Lumber Co., 46 W. Va. 56, 33 S. E. 125; Tennis Bros. Co. *v.* Wetzel, etc. Ry. Co., 140 Fed. 193.

[5] The view that claims must be looked at as of that date is supported by technical arguments. People *v.* American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200; Dean and Son's Appeal, 98 Pa. St. 101. It is also urged that it is necessary to prevent delay. People *v.* Commercial Alliance Life Ins. Co., 154 N. Y. 95, 47 N. E. 968. Nevertheless it seems possible to adopt a later date without causing any serious delay, and there are obvious advantages in so doing. Pennsylvania Steel Co. *v.* New York City Ry. Co., C. C. A., Second Circ., 1912. A further possibility is to avoid any fixed rule as to date of provability. This practice has been adopted by the English courts as the result of a statute. THE COMPANIES' ACT, 1862 (25 & 26 VICT., c. 89), § 158; *In re* Northern Counties of England Fire Ins. Co., 17 Ch. D. 337.

formance by the other contracting party.[6] In order to overcome this difficulty, some courts argue that the claim can be transformed into an action for damages, on the theory that the receivership is an anticipatory breach of the contract.[7] Even if the general doctrine of anticipatory breach be accepted, it is difficult to hold that the receivership is such a breach and satisfactorily account for the receiver's right to insist on performance of the contract.[8] However, apart from statutory difficulties,[9] there is no necessity for relying on that doctrine. The obligation to perform the contract is one of the corporation's liabilities, and, as a recent case points out, the obligee should receive the same consideration as the other creditors unless a more substantial reason than the technical question of contingency exists for treating him differently. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, *"Express Co.'s Appeal,"* C. C. A., Second Circ.

It has been urged that such a reason is found in the right of the corporation to carry out the contract itself provided that it resumes business in time to do so.[10] Yet since it is most unlikely that the corporation will ever be able to take advantage of this right, and since its interests are adequately protected by the receiver's authority to adopt all beneficial contracts, it is scarcely equitable to preserve this right at the cost of leaving the creditor practically without redress.[11] The latter's claim should therefore be held to be provable if its value can be computed in money. American courts are inclined to exaggerate their own inability to estimate the value of claims,[12] but it seems clear that a court which is accustomed to estimate the damages caused by a breach of contract to-day should generally be capable of assessing those which will arise from a breach to-morrow.[13] Therefore, the provability of a contract claim should not be denied merely because the contract is as yet unbroken.[14]

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[6] It has been suggested that the claim is contingent also on the receiver's refusal to adopt the contract. See Watson *v.* Merrill, *supra*. It seems clear, however, that an obligation is none the less absolute because it is uncertain whether the court through its agent, the receiver, will specifically perform it or not.

[7] *In re* Neff, *supra*; *Ex parte* Stapleton, 10 Ch. D. 586.

[8] *Cf.* Gibson *v.* Carruthers, 8 M. & W. 321; New England Iron Co. *v.* Gilbert R. Co., 91 N. Y. 153.

[9] For the probability of contingent claims under the National Bankruptcy Act of 1898, see 23 HARV. L. REV. 636.

[10] *In re* Imperial Brewing Co., 143 Fed. 579; Watson *v.* Merrill, *supra*.

[11] *Ex parte* Pollard, 2 Low. 411. No less illusory are the rights secured to the contract creditor by the rule of a recent case which allows him to come in only after the other claimants have been satisfied. People *v.* Metropolitan Surety Co., *supra*.

[12] Riggin *v.* Magwire, 15 Wall. (U. S.) 549. Even the court which decided the principal case refused to permit proof of claims whose value was really doubtful. Pennsylvania Steel Co. *v.* New York City Ry. Co., *supra*, "Crosstown Co.'s Appeal." The English courts are compelled by statute to take a more liberal view. THE COMPANIES' ACT, 1862, *supra*; THE BANKRUPTCY ACT, 1869 (32 & 33 VICT., c. 71), § 31; *In re* English Joint Stock Bank, L. R. 4 Eq. 350; *Ex parte* Blakemore, 5 Ch. D. 372.

[13] Certainly the difficulty is not materially lessened by calling the insolvency an anticipatory breach.

[14] This appears to be the view of most of the cases in jurisdictions where the issue has not been confused by the impossibility argument. Spader *v.* Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378; Insurance Commissioner *v.* People's Fire Ins. Co., 68 N. H. 51, 44 Atl. 82; Bowe *v.* Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151.